No. ~~1301~~

In the
Supreme Court of the United States
October Term, 1966

ALEXANDER TCHEREPNIN, MING TCHEREPNIN, CHARLES NOLL, MAYBELLE NOLL, HARRY BLOCK, JEANETTE A. BLOCK, WERNER D. BLOCK, ADRIAN DA PRATO, PETER DA PRATO, FREDERICK D. WAHL, ANNE W. WAHL, THEODORE MACHATKA, MARIE B. MACHATKA, JOSEPH NOVAK, FRANCES NOVAK, MARYBETH SIMJACK, WALTER R. ANDERSON and HELEN K. KELLOGG, *Petitioners,*

vs.

JOSEPH E. KNIGHT, JUSTIN HULMAN, CITY SAVINGS ASSOCIATION, DENNIS KIRBY, HARRY HARTMAN, LOUIS KWASMAN, ROBERT FRANZ, STANLEY PASKO, JOSEPH TALARICO, JR., HERBERT J. HOOVER, ROBERT M. KRAMER, C. ORAN MENSIK and GLORIA MENSIK SPRINCZ, *Respondents.*

On Petition For A Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit.

MEMORANDUM IN OPPOSITION TO THE MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

ALBERT E. JENNER, JR.
CHARLES J. O'LAUGHLIN
THOMAS L. EOVALDI
135 South La Salle Street
Chicago, Illinois 60603
SEYMOUR I. BURTON
111 West Washington Street
Chicago, Illinois
Attorneys for Respondents City Savings Association, Louis Kwasman, Harry Hartman and Dennis Kirby

Of Counsel:
RAYMOND, MAYER, JENNER & BLOCK
135 South La Salle Street
Chicago, Illinois 60603

INDEX

LIST OF AUTHORITIES

Cases

Statutes

Other

In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 1301

ALEXANDER TCHEREPNIN, MING TCHEREPNIN, CHARLES NOLL, MAYBELLE NOLL, HARRY BLOCK, JEANETTE A. BLOCK, WERNER D. BLOCK, ADRIAN DA PRATO, PETER DA PRATO, FREDERICK D. WAHL, ANNE W. WAHL, THEODORE MACHATKA, MARIE B. MACHATKA, JOSEPH NOVAK, FRANCES NOVAK, MARYBETH SIMJACK, WALTER R. ANDERSON and HELEN K. KELLOGG,

Petitioners,

VS.

JOSEPH E. KNIGHT, JUSTIN HULMAN, CITY SAVINGS ASSOCIATION, DENNIS KIRBY, HARRY HARTMAN, LOUIS KWASMAN, ROBERT FRANZ, STANLEY PASKO, JOSEPH TALARICO, JR., HERBERT J. HOOVER, ROBERT M. KRAMER, C. ORAN MENSIK and GLORIA MENSIK SPRINCZ,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit.

MEMORANDUM IN OPPOSITION TO THE MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

DISCUSSION

Respondents, City Savings Association, Louis Kwasman, Harry Hartman and Dennis Kirby, are filing this memorandum in response to the memorandum for the Securities

and Exchange Commission in support of the petition for a writ of certiorari, which was filed after these respondents had filed their brief in opposition to the petition for a writ of certiorari.

The statement of the case, as recited by the Securities and Exchange Commission, is generally correct, except that the assets of City Savings Association are not now in the custody of the Director of Financial Institutions of the State of Illinois as set forth, but, on the contrary, are in custody of the liquidators who were appointed pursuant to the Plan of Liquidation adopted in conformity with the Illinois Savings & Loan Act.

The same cannot be said, however, of the representations of the Commission as to the supposed importance of the case at bar. The Commission never addresses itself to the proposition that the depositors in Illinois savings and loan associations are entitled to "rescission" as a matter of law. *Ill. Rev. Stat.* ch. 33, §§762(a), 773(a) (1965). Given the right to rescind under state law, application of the "fraud provisions" of the 1934 Act are immaterial, and are merely merely cumulative of rights already possessed, assuming for sake of argument that the Act is applicable.

In an effort to make the case seem important, the Commission states that more than 100 billion dollars have been invested in savings and loan associations, 96% of which were insured by the Federal Savings and Loan Insurance Corporation, and then makes this astonishing statement: "The decision of the Court of Appeals withholds from a large portion of the investing public the protection afforded by the antifraud provisions of the 1934 Act . . ." (SEC Memo, p. 4) If 96% of the deposits are with institutions

regulated by the Federal Savings and Loan Insurance Corporation, and all are entitled to immediate rescission, the need for the application of the 1934 Act seems slight indeed.

Similarly, the SEC argument as to the effect of exempting brokers and dealers is wholly unsound, for there are no brokers and dealers in withdrawable capital accounts [if for no other reason that the accounts are not negotiable of a matter of law. Ill. Rev. Stat. ch. 32, §768 (1965)]. Surely the Commission must be confusing the permanent reserve shares with withdrawable capital accounts in making the argument it does on pages 6 and 7. There is wholly absent from this record the slightest indication that there has ever been a sale of withdrawable capital account. Obviously there can be no brokers or dealers in withdrawable capital accounts, and this supposed claim of importance is unfounded.

The SEC reasons that this case is important to its role in administering the securities laws because millions of Americans have invested in savings and loan associations. However, the SEC has previously failed to consider savings and loan associations as playing a significant role in the nation's capital market. This is evidenced by the failure of the SEC Special Study of Securities Markets to deal at all with savings and loan withdrawable capital accounts. This five volume study, completed in 1963, dealt with numerous securities and the operation of securities markets. The complete failure of the SEC to treat withdrawable capital accounts can only mean that withdrawable capital accounts are not commonly thought of as securities, that the SEC does not believe them important in the

functioning of the nation's capital market, and that the SEC is not concerned with regulating purchases of withdrawable capital accounts.

In its attempt to convince this Court of the need for review of the decision below, the SEC urges that the lower Court's decision conflicts with principles enunciated by this Court in *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1951) by restricting the application of the 1934 Act to instruments commonly known as securities. As pointed out in these Respondents' brief in opposition to the petition for a writ of certiorari (Brief in Opposition, pp. 4-5.), the Court's opinion is not so restrictive and does not restrict the application of the 1934 Act to instruments commonly known as securities. To the contrary, the decision below leaves standing numerous cases holding that instruments (many of which were not commonly known as securities) were securities under the 1934 Act.

The balance of the argument of the SEC is based upon the exemptions from registration found in the 1933 and 1934 Acts. [See Securities Act of 1933, §3(a)(15), 15 U.S.C. §77c(a)(5) (1964); Securities Exchange Act of 1934, §12(g)(2)(c), 15 U.S.C. §78l(g)(2)(c) (1964)]. The SEC argues that such exemptions indicate a Congressional intent that withdrawable capital accounts are securities in the first instance. A similar argument was made in the court below and was properly rejected. *Tcherepnin* v. *Knight*, 371 F.2d 374, 378-79 (7th Cir. 1967), (App. to Pet. 28-29.) A similar exemption exists in the 1933 Act for insurance policies. See Securities Act of 1933, §3(a)(8), 15 U.S.C. §77c(a)(8) (1964). But this exemption, although creating a negative implication that insurance policies are securities [*Loss, Securities Regulation* 497 (2d Ed. 1961)] has been interpreted by the SEC as not

implying that insurance policies are securities. See Hearings before Subcom. of Senate Com. on Banking and Currency on S. 2408, 81st Cong. 2d Sess. 33 (1950); *Loss, Securities Regulation* 497 (2d Ed. 1961). See also *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65, 74 n.4 (1959) (concurring opinion).

The Commission implies that the Court below erred in rejecting petitioners' argument that withdrawable capital accounts are investment contracts, certificates of interest or participation in any profit sharing agreement, transferable shares, or stock. While it may be true that withdrawable capital accounts possess some of the characteristics of each of those descriptive terms, nevertheless the court below correctly concluded that Congress did not intend withdrawable capital accounts to be securities. A whole-life insurance policy in a mutual insurance company possesses many of these attributes; yet, insurance policies admittedly are not securities. See *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 74 N. 4 (1959) (concurring opinion).

The phrases which are urged as including withdrawable capital accounts were designed by Congress to include novel and unique schemes not then known to Congress. As reflected in the definition, Congress specifically included all of those interests known to it which it desired to regulate. Withdrawable capital accounts were well known to Congress at this time and their failure to be included in the definition is evidence of Congressional intent that they be excluded.

The Commission finds no significance in the omission of the phrase "evidence of indebtedness" from the 1934 Act's definition of security. However, that omission

coupled with the specific inclusion by name of other evidences of indebtedness can only lead to the conclusion that Congress intended to exclude all evidence of indebtedness not specifically included. That Congress felt that withdrawable capital accounts possessed some of the characteristics of evidence of indebtedness is set forth in the Hearings on S. 875 before the Senate Committee on Banking and Currency, 73rd Cong. 1st Sess. 94-120.

Conclusion

For the reasons stated above and for the reasons stated in the brief in opposition to the petition for a writ of certiorari, these respondents respectfully pray that the petition for a writ of certiorari be denied.

Respectfully submitted,

ALBERT E. JENNER, JR.
CHARLES J. O'LAUGHLIN
SEYMOUR I. BURTON
THOMAS L. EOVALDI
Attorneys for Respondents, City Savings Association, Louis Kwasman, Harry Hartman and Dennis Kirby

Of Counsel:
RAYMOND, MAYER, JENNER & BLOCK
135 South La Salle Street
Chicago, Illinois 60603
RA 6-0220